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10   UNITED STATES DISTRICT COURT

11   NORTHERN DISTRICT OF CALIFORNIA

12   SAN JOSE DIVISION

13 IN RE APPLE & AT&TM ANTITRUST   CASE NO. C 07-5152 JW
    LITIGATION
14

15   **DEFENDANT APPLE INC.'S MOTION FOR
                                           LEAVE TO FILE MOTION FOR
16   RECONSIDERATION OF LIMITED
                                           PORTIONS OF THE ORDER GRANTING
17   IN PART AND DENYING IN PART
                                           APPLE'S MOTION TO DISMISS**

18

19   Judge: Honorable James Ware

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DEFENDANT APPLE'S MOTION FOR LEAVE TO FILE
MOTION FOR RECONSIDERATION
CASE NUMBER: C 07-05152 JW

1   **I.   INTRODUCTION**

2   Pursuant to Civil Local Rule 7-9, Defendant Apple Inc. ("Apple") respectfully requests

3   leave to file a motion for reconsideration of two limited portions of the Court's October 1, 2008

4   Order Granting in Part and Denying in Part Defendant Apple's Motion to Dismiss ("Order"): (i)

5   the holding that plaintiffs have adequately alleged the specific intent required for their computer

6   fraud claims, and (ii) the implicit but unstated holding that plaintiffs have adequately alleged

7   Apple's market power in the "iPhone Applications Aftermarket." Apple seeks reconsideration

8   because it respectfully believes that these portions of the Order are contrary to the allegations of

9   the complaint and concessions by plaintiffs.

10   First, plaintiffs have admitted they do not allege the type of specific intent the law

11   requires and the Court assumed in its ruling on the computer fraud claims. Plaintiffs' operative

12   complaint, the Revised Consolidated Amended Class Action Complaint ("RCAC"), explicitly

13   removed their earlier allegations that Apple intentionally designed Version 1.1.1 of its operating

14   system to damage unlocked iPhones. Plaintiffs dropped these allegations after Apple threatened

15   to seek Rule 11 sanctions. As a result, and as plaintiffs' counsel confirmed at the hearing,

16   plaintiffs now claim only that Apple acted "knowingly" with respect to Version 1.1.1, not

17   "deliberately" or with "specific intention." The Order's reading of the complaint is thus at odds

18   with plaintiffs' revisions to the RCAC and admissions.

19   Second, the Order's discussion of the alleged iPhone Applications Aftermarket does not

20   address or resolve plaintiffs' failure to adequately allege Apple's market power. The Order

21   states in the relevant section only that plaintiffs have "sufficiently alleged market power and

22   monopolization *in the iPhone voice and data services aftermarket*"—a different alleged

23   aftermarket. Order at 19:12-13 (emphasis added). This is not an insignificant omission; the

24   RCAC simply fails to allege Apple's market power in plaintiffs' broadly-alleged "applications

25   aftermarket." Plaintiffs merely state that Apple makes some unspecified amount of one type of

26   application, ring tones, but never claim Apple has any level of market share in any "applications

27   aftermarket," however broadly or narrowly defined.

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1 **II.   LEGAL STANDARD**

2   Under Civil Local Rule 7-9, "[n]o party may notice a motion for reconsideration without

3   first obtaining leave of Court to file the motion." Civ. L.R. 7-9(a). Such motions for leave are

4   proper where the order in question reflects "[a] manifest failure … to consider material facts or

5   dispositive legal arguments which were presented to the Court." Civ. L. R. 7-9(b)(3). Apple

6   respectfully submits that its motion should be granted on this basis.

7   **III.   DISCUSSION**

8   **A.   Plaintiffs Have Admitted They Are Not Alleging That Apple Acted With
                    The Specific Intent Required For Their Computer Fraud Claims**

9   As the Court's Order recognizes, plaintiffs' computer fraud causes of action (causes of

10   action based on criminal statutes) require a high level of specific intent. Order at 21, 23. The

11   intent threshold under the Computer Fraud and Abuse Act, 18 U.S.C. § 1030 *et seq.* ("CFAA") is

12   extremely high—the "conduct or the causing of the result must have been the person's *conscious*

13   *objective*." *Butera & Andrews v. Int'l Bus. Machs. Corp.*, 456 F. Supp. 2d 104, 109 (D.D.C.

14   2006), *quoting* S. Rep. No. 99-541, at 23 (1986) (emphasis added) (alterations omitted).

15   Similarly, the California Penal Code punishes those who utilize "computer instructions *that are*

16   *designed to* … damage [a computer] … without the intent or permission of the owner." Cal. Pen.

17   Code § 502(b)(10) (emphasis added); Order at 23.

18   The Order interpreted the RCAC to allege the requisite specific intent. In doing so, the

19   Court paraphrased the RCAC as alleging that:

20   Apple specifically intended to disable iPhones that contained
                    unapproved program unlocks. (Complaint ¶ 99.) Apple was aware
21   of the potential ramifications of Version 1.1.1 prior to its release and
                    none of the damaging aspects of Version 1.1.1 were necessary to
22   effectuate Apple's stated intent in releasing that software upgrade.
                    (Id. ¶¶ 98-103).
23

24   Order at 21. Apple respectfully submits that this paraphrasing of the RCAC attributes to

25   plaintiffs the allegation of a level of intent that plaintiffs themselves have explicitly disavowed.

26   We know this, without a doubt, because we asked plaintiffs, prior to the filing of the RCAC, and

27   they said so.

28   A brief overview of plaintiffs' shifting allegations on this issue is illustrative. Plaintiffs'

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1   earlier-filed Consolidated Amended Class Action Complaint ("CAC") *did* contain allegations of

2   specific bad intent on Apple's part in designing and releasing Version 1.1.1. These included

3   allegations, among others, that:

- "Apple issued a software update in which Apple had secretly embedded malicious codes designed to 'brick' (that is, render completely inoperable) or otherwise damage the iPhones . . ." (CAC ¶ 5)
- Apple had "deliberately damaged or destroyed [consumers'] iPhones" (CAC ¶ 6)
- Apple had "embedded malicious codes within the upgrade that would cause to malfunction or 'brick'" unlocked iPhones (CAC ¶ 8)
- Apple's upgraded operating system "was designed to damage or destroy iPhone that had been or might later be unlocked or on which any Third Party App had been or might later be installed." (CAC ¶ 73).

10   Because those allegations were utterly baseless, Apple asked plaintiffs' counsel to state

11   their good faith basis for making those allegations. *See, e.g.*, *Barber v. Miller*, 146 F.3d 707, 710

12   (9th Cir. 1998). In response, and subsequent to several exchanges between the parties, plaintiffs

13   amended their complaint.

14   As a redline comparing the RCAC with the earlier CAC demonstrates (submitted as

15   Attachment 1 to this motion), plaintiffs removed their allegations of Apple's specific, conscious

16   intent, including the bulleted allegations. The changes to plaintiffs' lead paragraphs

17   summarizing the computer fraud allegations are particularly noteworthy:

> 5. In ~~an act that can only be described as reprehensible and unconscionable, as well as illegal, Apple retaliated against and punished consumers who had exercised~~ **response to consumers exercising** their legal right to unlock their ~~iPhone or who had installed~~ **iPhones or to install** software applications that competed with Apple's. ~~On~~**, on** September 27, 2007, under the guise of issuing an "upgraded" version of the iPhone operating software, Apple **knowingly** issued ~~a software update in which Apple had secretly embedded malicious codes designed to "brick~~ **and caused transmission of a purported update to the iPhone operating software, known as Version 1.1.1, which "bricked**" (that is, render**ed** completely inoperable) or otherwise damage**d** ~~the~~ **some** iPhones ~~of any consumer~~ that ~~had~~ **were** unlocked ~~the iPhone~~ or **had** downloaded competing **software** applications.
>
> 6. … Because Apple had ~~deliberately damaged or destroyed their~~ **intentionally released and transmitted Version 1.1.1 knowing that it would damage or destroy unlocked** iPhones, Apple and AT&TM were obligated by law to honor their warranties and repair or replace the phones.

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1   RCAC ¶¶ 5, 6 (redlined against CAC ¶¶ 5, 6). The redline shows that in the RCAC, plaintiffs

2   limited their use of the conclusory word "intent" to the physical act of Apple's releasing Version

3   1.1.1 (i.e., Apple "intentionally released and transmitted Version 1.1.1."). *Id.*

4   　　　　　Plaintiffs confirmed this point at the hearing:

5   　　　　　　　　The Court: The argument was made that you revised your complaint and
     　　　　　　　　in the revision something was taken away from the intention that it was
6   　　　　　　　　done deliberately.

7   　　　　　　　　Mr. Rifkin: Yes, we have—we had a disagreement with Apple about one
     　　　　　　　　particular issue and that was did Apple sit down and write the code with
8   　　　　　　　　the expressed purpose in mind of destroying iPhones? We don't know
     　　　　　　　　that to be a fact.

9   　　　　　　　　…

10   　　　　　　　　The Court: **So although you don't know whether it was done
     　　　　　　　　deliberately, it was done knowingly.**
11
     　　　　　　　　Mr. Rifkin: **That is correct. We don't know whether the programmer
12   　　　　　　　　has a specific intention in mind.** We don't think it matters. There's no
     　　　　　　　　dispute, and we have alleged, and frankly Apple has announced that it
13   　　　　　　　　**knew** when it released Version 1.1.1 that it was going to destroy iPhones.

14   9/12/08 Hearing Tr. At 84:17-86:22 (emphasis added) (relevant portions submitted as

15   Attachment 2).[1]

16   　　　　　There is a vast practical difference between what plaintiffs actually allege, and what they

17   must in order to plead computer fraud. Plaintiffs have made clear that they merely allege that

18   Apple, without malicious intent, developed updated operating software that it knew—as a side

19   effect—might prove incompatible with and disable some iPhones that had been altered by their

20   owners. That is a far cry from the intent contemplated under the criminal statutes on which

21   plaintiffs rely, which involves a specific intent to cause the harm; in other words, that the

22   defendant's goal and design was to inflict the harm. It is now undisputed that plaintiffs do not

23   (and cannot, in good faith) allege that kind of intent, nor can they allege that "Apple specifically

24   intended to disable iPhones that contained unapproved program unlocks," as the Court's Order

25   takes the RCAC to allege. Order at 21 (paraphrasing RCAC ¶ 99). As a result, these claims

26

27   [1]   If the Court would find it helpful to also review the parties' underlying Rule 11
     　　correspondence, in addition to plaintiffs' admissions and the redlined comparison of the
     　　complaints, Apple would be pleased to submit these documents at the Court's direction.
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1   cannot survive, given plaintiffs' inability to plead Apple's specific intent, unless the Court

2   determines that plaintiffs need only plead that Apple acted knowingly.

3   But the Order does not hold that mere "knowing" behavior alone would be sufficient, and

4   it does not suffice— plaintiffs must allege that the disabling of unlocked iPhones was Apple's

5   "*conscious objective*" and that Version 1.1.1 was "*designed to …* damage" those unlocked

6   iPhones. Cal. Pen. Code §§ 502(c)(8), (b)(10) (emphasis added); *see also Butera & Andrews*,

7   456 F. Supp. 2d at 109. That is exactly what plaintiffs explicitly agreed they were not alleging—

8   they dropped their earlier allegations that Apple had "designed" Version 1.1.1 to damage

9   iPhones, and thus cannot possibly be alleging this claim adequately. *Compare* CAC ¶ 73 with

10 RCAC ¶ 73 ("Apple ~~viciously~~ retaliated against iPhone purchasers who utilized these unlocking

11 features by **knowingly and intentionally** issuing **and transmitting** an iPhone operating system

12 "upgrade" that ~~was designed to damage or destroy any iPhone~~ **damaged or destroyed many**

13 **iPhones**…").[2]

14   In sum, plaintiffs simply have not alleged the level of intent required to state these

15 computer fraud claims. Absent that allegation, the claims cannot stand and the Court should

16 dismiss them.

17   **B.   Plaintiffs Do Not And Cannot Allege That Apple Has Market Power**
            In Their Alleged "iPhone Applications Aftermarket"
18

19   The Court's Order addressed Apple's argument that plaintiffs had not properly pled an

20 "iPhone Applications Aftermarket" and we do not seek to reargue that point here. But in the

21 section of the Order headed "Market Power in the iPhone Applications Aftermarket" the Court

22 never addressed Apple's showing that plaintiffs had failed to plead Apple's market power in that

23 alleged market. The Court instead merely stated that plaintiffs have "sufficiently alleged market

24 _____

        [2] Plaintiffs and the Court cite to one additional subsection of § 502, which permits an action
25   against one who "[k]nowingly accesses and without permission adds, alters, damages, deletes,
        or destroys any data, computer software, or computer programs." Cal. Pen. Code § 502(c)(4).
26   This subsection is inapposite. The RCAC repeatedly admits that *plaintiffs themselves*, and
        other iPhone owners, were the ones that decided to and did access and download Apple's
27   Version 1.1.1. *See*, *e.g.*, RCAC ¶¶ 9, 45, 56, 103, 112(n), 153. Apple did not initiate or force
        "access" of this downloading, knowingly or otherwise.

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1 power and monopolization *in the iPhone voice and data services aftermarket*." Order at 19:12-

2 13 (emphasis added).

3   The RCAC simply does not plead anything close to market power, however one defines

4 the "iPhone Applications Aftermarket." The RCAC itself does not plead that Apple has a

5 predominant, or even any particular, market share. In response to Apple's motion, Plaintiffs only

6 alleged that Apple makes some unspecified amount of one type of application—ring tones. Opp.

7 at 17. This means at best plaintiffs have alleged that Apple is a participant in the "iPhone

8 applications aftermarket," but not that it monopolizes that market. If anything, it concedes the

9 point that Apple in fact does *not* have market power in the broadly-alleged applications

10 aftermarket, which covers thousands of such applications.

11   It is plaintiffs' burden to allege that Apple has the requisite market power *in the*

12 *aftermarket that plaintiffs are alleging*. *See* Order at 12; *Newcal Indus., Inc. v. Ikon Office*

13 *Solution,* 513 F.3d 1038, 1044 (9th Cir. 2008) ("In order to state a valid claim under the Sherman

14 Act, a plaintiff must allege that the defendant has market power within a 'relevant market.' That

15 is, the plaintiff must allege both that a 'relevant market' exists and that the defendant has power

16 within that market.") Plaintiffs cannot defer their burden of alleging the requisite market power

17 in their own purported aftermarket to a later stage in the litigation, nor move forward with a

18 baseless, overly broad aftermarket claim now in the hopes that they can allege various narrower

19 "submarkets" after discovery.[3] They must presently allege a specific applications aftermarket in

20 which they can claim in good faith that Apple has market power. As the RCAC does not and

21 cannot allege the requisite market power in plaintiffs' purported "iPhone Applications

22 Aftermarket," these claims should appropriately be dismissed.

23 ///

24

25 [3] In a separate section of the Order, the Court states that "[a] determination of whether the
   'applications aftermarket' should appropriately be split into more specific sub-markets is a
   factual issue more appropriate for determination at a later state in this litigation." Order at 16,
26 n.6. This statement is made in reference to whether the "applications aftermarket" can be a
   cognizable antitrust market, and not whether plaintiffs have adequately alleged the requisite
27 market power in their purported aftermarket. Under *Ikon* and black-letter law, plaintiffs must
   be able to adequately allege market power now in order to proceed with their claim.

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IV.   CONCLUSION

2   For the foregoing reasons, Apple respectfully requests leave to file a limited motion for

3   reconsideration of these portions of the Court's Order.

4   Dated: October 30, 2008   Respectfully submitted,

5   LATHAM & WATKINS LLP

6

7   By _____/s/ Alfred C. Pfeiffer, Jr._____
                                                              Alfred C. Pfeiffer, Jr.
8   Attorneys for Defendant APPLE INC.

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